

second or successive petition pursuant to 28 U.S.C. § 2244(b).

DISCUSSION

Petitioner moves the Court for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). In the instant motion, Petitioner alleges two new claims for habeas relief: (1) the prosecution committed misconduct by convincing the trial court that it did not have to exclude any of the prosecution's witnesses from the preliminary examination; and (2) the prosecution acted in collusion with the expert witness to expound a theory developed by the witness and her business partner at their anger management clinic.

A Rule 60(b) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. Gonzalez v. Crosby, 545 U.S. 524, 537-38 (2005). If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute and rules. Id. at 533.

A Rule 60(b) motion that contains one or more "claims," i.e., an asserted basis for relief from a state court's judgment of conviction, is, if not in substance a successive habeas petition, at least similar enough that failing to subject it to the same requirements would be inconsistent with the habeas statute. Gonzalez, 545 U.S. at 530-31. In most cases, determining whether a Rule 60(b) motion advances one or more "claims," and therefore should be treated as a successive habeas petition, will be relatively simple. Id. at 532. A motion that seeks to add a new ground for relief will of course qualify. Id. A motion can also be said to bring a "claim" if it attack's the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. Id. at 532; see also Allen v. Ornoski, 435 F.3d 946, 957 (9th Cir. 2006)

(in most cases, a Rule 60(b) motion should be treated as a successive habeas petition if the factual predicate for the motion also states a claim for a successive petition under 28 U.S.C. § 2244(b)); Ortiz v. Stewart, 195 F.3d 520, 520-21 (9th Cir. 1999) (same); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (same).

A district court must dismiss claims presented in a second or successive habeas petition challenging the same conviction and sentence unless the claims presented in the previous petition were denied for failure to exhaust. See 28 U.S.C. § 2244(b)(1); Babbitt v. Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). Additionally, a district court must dismiss any new claims raised in a successive petition unless the petitioner received an order from the court of appeals authorizing the district court to consider the petition. See 28 U.S.C. § 2244(b)(2), (3).

The Court construes Petitioner's motion pursuant to Rule 60(b) as a second or successive petition challenging the same conviction and sentence as in Petitioner's earlier habeas action, C 01-20766 JF (PR). Petitioner raises two new claims of error in his 1995 Santa Clara Superior Court criminal proceedings. See Pet.'s Motion at 6-10. The instant motion challenges the same conviction and sentence as the earlier petition in case no. C 01-20766 JF (PR). This earlier habeas petition was denied on the merits, and Petitioner has not presented an order from the Court of Appeals authorizing this Court to consider any new claims. Accordingly, this Court must dismiss the instant habeas action in its entirety. See 28 U.S.C. § 2244(b)(3)(A).

CONCLUSION

Petitioner's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (docket no. 1) is DENIED. The instant habeas action is DISMISSED without prejudice as a second and successive petition pursuant to 28 U.S.C. § 2244(b).

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1 Based upon the dismissal, Petitioner's motions to proceed in forma pauperis (docket nos.
2 2, 4) are DENIED as moot. The Clerk shall terminate any pending motions and close the
3 file.

4 IT IS SO ORDERED.

5 DATED: 5/9/08


JEREMY FOGEL
United States District Judge